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In the Supreme Court of the United States

October Term, 1988

TERRY A. BORING, ANDRE CALHOUN, WELDON FELLS, DALE E. GEIDEL, RONALD PERRY and DAVID BEATTY
Petitioners,

vs.

CHARLES J. KOZAKIEWICZ, GARY KNOTTS and EDWARD DeSABATO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where, in a case involving demands for both monetary and numerous forms of injunctive and declaratory relief regarding the constitutionality of various conditions of a jail and treatment of prisoners, does an award of one dollar each for a limited number of the plaintiffs as to three of numerous defendants constitute plaintiffs as "prevailing parties" entitling them to recovery of all attorneys' fees under 42 U.S.C. Section 1988?

2. Does a local rule of court providing for a strict time limitation within which to make a Motion for Attorneys' Fees apply to a claim for attorneys' fees pursuant to 42 U.S.C. Section 1988, whether or not such fees are labeled as "costs"?

3. Where an award of one dollar is made to each of a limited number of several plaintiffs as to only three of numerous defendants and only as to certain claims contained in plaintiffs' Complaint, are defendants entitled to an evidentiary hearing regarding the appropriateness of certain attorneys' fees claimed under 42 U.S.C. Section 1988?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iv
Appendix	vi
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	8
Jurisdiction of the Courts Below	10
Reasons for Granting the Writ	11
The decision of the Third Circuit conflicts with previous decisions of this Court, decisions of other circuit court opinions and involves important questions which have not been, but should be, decided by this Court	11
I. Where, in a case involving demands for both monetary and numerous forms of injunctive and declaratory relief regarding the constitutionality of various conditions of a jail and treatment of prisoners, does an award of one dollar each for a limited number of the plaintiffs as to three of numerous defendants constitute plaintiffs as "prevailing parties" entitling them to recovery of all attorneys' fees under 42 U.S.C. Section 1988?	11

Page

II. Does a Local Rule of Court providing for a strict time limitation within which to make a Motion for Attorneys' Fees apply to a claim for attorneys' fees pursuant to 42 U.S.C. Section 1988, whether or not such fees are labeled as "costs"? 18

III. Where an award of one dollar is made to each of a limited number of several plaintiffs as to only three of numerous defendants and only as to certain claims contained in plaintiffs' Complaint, are defendants entitled to an evidentiary hearing regarding the appropriateness of certain attorneys' fees claimed under 42 U.S.C. Section 1988? 23

Conclusions 28

TABLE OF CITATIONS

CASES CITED:

Page

Hensley v. Eckerhart, 461 U.S. 424 (1983) 12, 14, 15, 16, 24, 25, 26

Hewitt v. Helms, U.S. 96 L.Ed. 2d. 564, 107 S.Ct. 2672 (1987) 14, 15, 16

Marek v. Chesney, 473 U.S. 1 (1985) 19

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) 19, 20, 21, 22

Anderson v. Morris, 658 F.2d 246, (4th Cir. 1981)..... 27

Carbalan v. Vaughn, 76 F.2d. 662 (11th Cir. 1985).... 14

Franklin v. Shields, 569 F.2d. 784 (4th Cir. 1978)..... 16

Hall v. Borough of Roselle, 747 F.2d. 838 (3rd Cir. 1983)..... 19

Hughes v. Repko, 576 F.2d. 483, 487 (3rd Cir. 1978) .. 15

Inmates of Allegheny County v. Pierce, 716 F.2d. 177, 181 (3rd Cir. 1983)..... 17, 20, 25, 26

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d. 897 (3rd Cir. 1985) 15

King v. Greenblatt, 560 F.2d. 1024 (1st Cir. 1977) *cert. den* 438 U.S. 916 (1977)..... 26

Knighton v. Watkins, 616 F.2d. 795 (5th Cir. 1980)..... 21, 22

Nadean v. Helgemoe, 581 F.2d. 275, 278-79 (1st Cir. 1978) 12

Obin v. District No. 9 of the International Association of Machinists and Aerospace Workers, 651 F.2d. 575 (8th Cir. 1981)..... 20, 21

Page

Taylor v. Sterrett, 640 F.2d. 663, 669 (5th Cir. 1981) 12, 14

Best v. Boswell, 516 F.Supp. 1063 (M.D. Ala., 1981) ... 16

Fast v. School District of the City of Ladue, 543 F.Supp. 785 (E.D. Mo., 1982) 16

Hamilton v. Bruce, 552 F.Supp. 649 (W.D. Va., 1982) 15

Ohland v. City of Montpelier, 467 F.Supp. 324 (D. Vt., 1979) 16

Skoda v. Fontani, 519 F.Supp. 309 (N.D. Ill., 1981) ... 17

STATUTES CITED:

18 U.S.C. Sections 3006(A)(d)(1) 26, 27
28 U.S.C. Section 1291 10
28 U.S.C. Section 1331 10
28 U.S.C. Section 2101(c) 2
42 U.S.C. Section 1983 ..... 3, 11, 12, 20
42 U.S.C. Section 1988 ..... 3, 12, 17, 18, 19 20, 21, 22, 23, 24, 26

RULES CITED

Rules 33, Local Rules for the District Court for the Western District of Pennsylvania ... 7, 18, 19, 20, 22
Federal Rule of Civil Procedure 54 ..... 4, 5, 19, 21
Federal Rule of Civil Procedure 59 ... 5, 6, 18, 19, 21, 22
Federal Rule of Civil Procedure 68 ..... 6, 7, 19

Appendix

Page

Appendix A—Judgment Order of United States Court of Appeals for the Third Circuit *Boring, et al. v. Kozakiewicz, et al.* No. 87-3798, June 8, 1988 ..... 2a

Appendix B—Order of the Honorable Glenn E. Mencer, *Boring, et al. v. Kozakiewicz, et al.*, C.A. No. 81-1446, November 9, 1987 ..... 3a

Appendix C—Memorandum Opinion of the Honorable Glenn E. Mencer, *Boring, et al. v. Kozakiewicz, et al.*, C.A. No. 81-1446, November 9, 1987 ..... 4a

Appendix D—Order of Judgment by the Honorable Glenn E. Mencer, *Boring et al. v. Kozakiewicz, et al.*, C.A. No. 81-1446, October 29, 1986 ..... 8a

Appendix E—Order of the Honorable Glenn E. Mencer, *Boring, et al. v. Kozakiewicz, et al.*, C.A. No. 81-1446, November 3, 1986 ..... 11a

Appendix F—Plaintiffs Motion Requesting Costs and Attorney's Fees 12a

Appendix G—Defendants' Answer to Plaintiffs' Motion Requesting Costs and Attorney's Fees ... 62a

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit in *Boring, et al. v. Kozakiewicz, et al.* is unreported. The Order of the Court is included in the Appendix. The decision and Order of the United States District Court for the Western District of Pennsylvania is unreported and is included in the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals affirmed the decision of the District Court for the Western District of Pennsylvania on June 8, 1988.

This Court's jurisdiction is based upon 28 U.S.C. Section 2101(c) as this is a Petition for Writ of Certiorari intended to bring before the Court a judgment in a civil action rendered by the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1983, which provides:

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 1988, which provides:

Section 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,

so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of the criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 USCS Sections 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS Sections 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS Sections 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS Sections 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Civil Procedure 54, which provides:

Rule 54. Judgments; Costs.

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an

express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) COSTS. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxes by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Federal Civil Procedure 59, which provides:

Rule 59. New Trials; Amendments of Judgments.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on the part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the

United States, and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Civil Procedure 68, which provides:

> **Rule 68. Offer of Judgment.**
>
> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 33, local Rules for the District Court for the Western District of Pennsylvania, which provides:

> **Rule 33. Motions for Attorney's Fees.**
>
> Any motion for the award of attorney's fees which is not required to be filed prior to the entry of final judgment shall be filed within 10 days of entry of the final judgment by the district court whether or not an appeal has been or is subsequently filed.

STATEMENT OF THE CASE

The plaintiffs in this federal question action, eight of them in all, instituted suit, pro se, on August 17, 1988 while still inmates at the Allegheny County Jail. The plaintiffs claim violation of civil rights resulting from certain conditions existing at the jail and named numerous defendants, including the warden, Charles Kozakiewicz, the then deputy warden, Gary Knotts, and the administrative assistant, Edward DeSabato.

Subsequently, the district court appointed Lynn J. Alstadt as counsel for plaintiffs on January 14, 1982. Mr. Alstadt was joined by his associates, Thomas Schaffer and Michael Dever, in the handling of the case as it progressed through the stages of discovery to trial. Trial in the matter took place beginning on October 20, 1986 with the jury returning its verdict on October 28, 1986. Judgment was entered on the verdict by the District Court on October 29, 1986. The judgment consisted of awarding one dollar to each of six plaintiffs as against the three county defendants and involved no provision for any of the numerous forms of injunctive and declaratory relief demanded and sought.

On November 21, 1986, plaintiffs filed a timely Notice of Appeal on substantive issues unrelated to attorneys' fees and costs, serving proper notice to the district court and all counsel. The Appeal dealt with the issue of the court having directed verdicts for all defendants on the issue of improper medical treatment. This Appeal was argued before the United States Court of Appeals for the Third Circuit and an Opinion filed upholding the directed verdict on November 16, 1987, with the slip opinion received at the district court on November 23, 1987. On December 11, 1986, plaintiffs filed a Motion for Fees and Costs; as many of the fees were apparently directed toward work which

related to pursuit of the completely unsuccessful medical mistreatment claims and otherwise appeared to be unreasonable and disputable, and pursuant to court order, defendants filed their Answer to said Motion and Brief in Support thereof on January 8, 1987, a Motion upon which the district court has never ruled. Plaintiffs subsequently filed a Motion for Extension of Time to File a Request for Attorneys' Fees on January 15, 1987. Plaintiffs' Motion for Fees and Costs requested some $89,152.43 and has schedules A, B, C and D attached thereto to show hours expended on the case by each of the three plaintiff attorneys. Defendants filed a response to the Motion for Extension of Time to Request Attorneys' Fees on May 20, 1986, and again, the district court made no ruling. On November 9, 1987, the Honorable Glenn E. Mencer issued an Order and Memorandum Opinion awarding plaintiffs $41,764.47 in attorneys' fees and costs, and defendants filed an Appeal in a timely fashion. On June 8, 1988, the Court of Appeals for the Third Circuit issued its Order affirming the District Court's ruling on the matter.

JURISDICTION OF THE COURTS BELOW

Jurisdiction in the District Court was based upon the federal question claims presented in the action, pursuant to 28 U.S.C. Section 1331. Jurisdiction of the Court of Appeals was based upon 28 U.S.C. Section 1291 as the Appeal was from a final judgment of the United States District Court for the Western District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE THIRD CIRCUIT CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT, DECISIONS OF OTHER CIRCUIT COURT OPINIONS AND INVOLVES IMPORTANT QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

I. WHERE, IN A CASE INVOLVING DEMANDS FOR BOTH MONETARY AND NUMEROUS FORMS OF INJUNCTIVE AND DECLARATORY RELIEF REGARDING THE CONSTITUTIONALITY OF VARIOUS CONDITIONS OF JAIL AND TREATMENT OF PRISONERS, DOES AN AWARD OF ONE DOLLAR EACH FOR A LIMITED NUMBER OF THE PLAINTIFFS AS TO THREE OF NUMEROUS DEFENDANTS CONSTITUTE PLAINTIFFS AS "PREVAILING PARTIES" ENTITLING THEM TO RECOVERY OF ALL ATTORNEYS' FEES UNDER 42 U.S.C. SECTION 1988?

In the instant matter, claims were set forth against the petitioning defendants regarding a multitude of conditions and treatments allegedly present at the Allegheny County Jail, including the general living conditions, medical treatment of the individual plaintiffs, contact visitation practices, availability of religious services for certain plaintiffs, quality of meals, access to the telephone and the composition of disciplinary boards which reviewed and set punishment for plaintiff inmate misconduct. In addition to financial remuneration for the alleged violations under 42 U.S.C. Section 1983, plaintiffs sought numerous forms of

injunctive and declaratory relief, including: the granting of temporary and injunctive relief to enjoin the defendants from retaliation in a number of forms for the filing of plaintiffs' action; the closing of the jail; the placement of the facility under the direct supervision of the District Court and United States Marshall; and the issuance of a Contempt Order. Plaintiffs also sought punitive damages. Awarded by the jury were damages of one dollar from the county defendants as to each of six plaintiffs, the grounds for which being unspecified.

Argued strenuously below was that plaintiffs were not "prevailing parties" as required under 42 U.S.C. Section 1988 claim for attorneys' fees. In order for a claim for attorneys' fees arising under Section 1983 claim to be permitted, the claimant must be seen as a prevailing party. This is the point upon which the Circuit Court decision is in conflict with other Circuit Court Opinions, in conflict with its own decisions, and the point which presents an important question requiring guidance from the Supreme Court.

The Supreme Court initially directly addressed the question definitively in its opinion in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). This Court established a generous standard for the determination of whether one is a prevailing party, stating that a party did not have to be successful on all aspects or issues of a case to be deemed prevailing, simply that the party must succeed in a significant issue and be granted at least some of the benefits sought. 461 U.S. at 433, citing *Taylor v. Sterrett,* 640 F.2d. 663, 669 (5th Cir. 1981); *Nadean v. Helgemoe,* 81 F.2d. 275, 278-79 (1st Cir. 1978). Unfortunately, the facts of the case did not provide much guidance as to what a "significant issue" would be or what the nature of "granting some of the

benefits sought" could entail. Some guidance was obtained by this Court's more recent Opinion in *Hewitt v. Helms,* U.S. , 96 L.Ed. 2d. 564, 107 S.Ct. 2672 (1987). In that case, plaintiff had been vindicated by the Circuit Court on his claims that he had been convicted of striking a corrections officer on the basis of hearsay evidence as to statements of an undisclosed informant, with the ruling that his rights had been violated. However, plaintiff had neither been awarded damages or injunctive or declaratory relief nor had he obtained an Order expunging his prisoner record or received any less formal relief. This Court held that plaintiff was not a prevailing party for purposes of 42 U.S.C. Section 1988 entitlement to attorneys' fees. The rationale of the *Hewitt* Court is clearly applicable here, and the Third Circuit Court of Appeals failed to follow its lead. There can be no logical distinction between the *Hewitt* scenario and the instant matter, where virtually the only difference is that plaintiffs here were given one dollar where Hewitt was not. Both claimants had their rights declared violated in some way but had failed to gain the actual goal of the lawsuit, i.e., compensatory or injunctive relief. There can be no reasonable doubt that plaintiffs herein were not interested in receiving a one dollar award; plaintiffs desired compensatory and punitive damages as well as a range of formal injunctive and declaratory relief. There similarly was no informal desired relief evidenced below. To distinguish the instant matter on the basis of a nominal fee of one dollar clearly flies in the face of this Court's *Hewitt* ruling. Thus, the Third Circuit here is in contravention of the logical conclusion of the *Hewitt* Court and, by natural implication, the dictates of *Hensley.*

The question of a nominal award situation has proven to be grounds for a great deal of controversy within the

federal court's system and, while a logical extrapolation of *Hewitt* should decide the issue, three is a need to have the Supreme Court address the issue squarely, especially in a case such as the instant matter where plaintiffs virtually lost a case and the attorneys now seek a windfall. The Court of Appeals in the Eleventh Circuit recently faced a situation where a plaintiff was disputing bail in *Carbalan v. Vaughn,* 76 F.2d. 662 (11th Cir. 1985). The plaintiff therein argued that there had been a constitutional violation in the setting of his bail and sought money damages against the judge and the city. 760 F.2d. at 663. The jury clearly found that there had been a constitutional violation, but because of the immunity of the defendants, no favorable ruling was given. The Court held that plaintiffs were not prevailing parties, despite the fact that a constitutional violation was found, since they did not receive any of the "primary relief sought," citing *Taylor v. Sterrett, supra.* While the standard for the decision was worded somewhat differently, it is clearly compatable with that in *Hensley* and subsequently in *Hewitt.* Further, under this standard, there is no rational basis for treating the instant matter any differently.

The Third Circuit below also was in violation of its own recent standard espoused in *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d. 897 (3rd Cir. 1985). In that case, in making a determination as to whether or not a plaintiff was a prevailing party for attorneys' fees purposes, the court stated that to apply the prevailing party standard, a court is to first identify the relief plaintiffs sought, and in relevant cases, the legal theories upon which relief was based, the Circuit Court noting that the focus of analysis should be as to the relief actually obtained rather than on success of legal theories. Under

that standard, certainly compatable with *Hensley* and clearly on terms with *Hewitt,* the court in the instant matter could not have found plaintiffs to be prevailing parties. See, *Hughes v. Repko,* 576 F.2d. 483, 487 (3rd Cir. 1978).

The ruling in question is also in conflict with a number of district court decisions within other circuits specifically involving nominal sums. In *Hamilton v. Bruce,* 552 F.Supp. 649 (W.D. Va., 1982), one of several defendants insured by the same insurer settled with plaintiff in the amount of $6,000.00 after an initial demand of $25,000.00. Finding plaintiff a prevailing party, the Court noted that it "could not say that settlement of $6,000.00 is settlement for a nominal sum." 552 F.Supp. at 650. The natural conclusion to draw from that statement is that a nominal sum awarded would not have constituted plaintiff a prevailing party. In the instant action, one dollar is clearly a nominal sum.

Similarly, the case of *Fast v. School District of the City of Ladue,* 543 F.Supp. 785 (E.D. Mo., 1982), is virtually on all fours with the instant matter, yet the two courts draw different conclusions. In that matter, constitutional violations were alleged over the lack of a pre-termination hearing for a school employee. Plaintiff made a demand for money damages and a score of injunctive and declaratory relief much as in the instant matter. Plaintiff was awarded one dollar in damages and given the opportunity to respond to the charges against him, a "far cry" from what was demanded. 543 F.Supp. at 787. The Court held that a finding of a due process violation would be insufficient to quality plaintiff as a prevailing party; this alone was not a significant issue where the relief granted was not "some of the benefits sought by bringing the suit," *citing Best v. Boswell,* 516 F.Supp. 1063 (M.D. Ala., 1981); *Ohland v.*

City of Montpelier, 467 F.Supp. 324 (D. Vt., 1979). 543 F.Supp. at 487-88. The benefits awarded, as here, were simply not those desired. Both the *Best* and *Ohland* cases make clear that a win on a constitutional issue, without appropriate relief, is not to be considered prevailing. *See also Franklin v. Shields,* 569 F.2d. 784 (4th Cir. 1978), where granting one of six demands did not constitute "prevailing."

While the cases cited above were decided before *Hensley* and *Hewitt,* the standard applied was quite similar and makes clear that the instant matter was decided improperly in light of that standard. The cases cited are certainly not controlling decisions in any respect, but they do tend to shed some light on to whether or not a victory in a nominal amount makes a party a prevailing party for purposes of Section 1988.

Plaintiffs below cite a number of decisions that support the proposition that a complete victory is not needed to qualify for attorneys' fees, that a partial victory on the merits is sufficient. *See, e.g. Hughes, supra; Hall v. Borough of Roselle,* 747 F.2d. 838 (3rd Cir. 1984); *Inmates of Allegheny County v. Pierce,* 716 F.2d. 177, 181 (3rd Cir. 1983). While these cases do not specifically involve nominal sums such as a one dollar award, there are a few district court decisions that suggest a nominal fee may in fact constitute a plaintiff as prevailing. *See, e.g., Skoda v. Fontani,* 519 F.Supp. 309 (N.D. Ill., 1981). While clearly the Circuit Court opinion in the instant matter is in violation of the proper manner to resolve this issue as set forth by the Supreme Court, prior Third Circuit decisions as well as other district court and Circuit Court opinions, warranting a granting of this Petition for Writ, the issue of

nominal damages is one which needs to be specifically addressed by this Court as well.

II. DOES A LOCAL RULE OF COURT PROVIDING FOR A STRICT TIME LIMITATION WITHIN WHICH TO MAKE A MOTION FOR ATTORNEYS' FEES APPLY TO A CLAIM FOR ATTORNEYS' FEES PURSUANT TO 42 U.S.C. SECTION 1988, WHETHER OR NOT SUCH FEES ARE LABELED AS "COSTS"?

The Circuit Court allowance of attorneys' fees in the instant matter is also in violation of Local Rule 33 of the Local Rules of Court for the Western District of Pennsylvania as well as in violation of prior case law of this Court and other Circuit Courts.

Initially, as indicated above, the district court entered a final judgment on the jury verdict on October 29, 1986, with a Clarification Order on the directed verdict entered on November 3, 1986. Plaintiff filed a Motion for Fees and Costs on December 11, 1986, some forty-three days after entry of judgment. Local Rule 33, as set forth above, provides that any motion for the Award of Attorneys' Fees shall be filed within ten days of entry of final judgment by the district court, and this clearly was not done in the instant matter.

Plaintiffs, however, disputed below the applicability of Rule 33 by asserting that attorneys' fees under Section 1988 are actually "costs," such that there would for now be no local rule governing the timeliness for application. Plaintiffs cite the language of Section 1988, allowing the prevailing party a "reasonable attorney's fee as part of the

costs." Further, citation is made to Rule 59(e) of the Federal Rules of Civil Procedure and the Supreme Court's ruling in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), which held that the ten day limit to alter or amend a judgment set forth in Rule 59(e) of the Federal Rules of Civil Procedure was not applicable to Motions for Section 1988 attorneys' fees. Plaintiffs also rely upon the Court's refusal in that case to make a determination of whether the Motion for Fees constituted one for costs that would be governed by Rule 54(d) and Rule 58 of the federal Rules of Civil Procedure. Finally, plaintiffs rely upon the Supreme Court's ruling in *Marek v. Chesney*, 473 U.S. 1 (1985), which held that the cost-shifting provisions of Rule 68 are applicable to the award of attorneys' fees in a civil rights action.

Plaintiffs' analysis misses the simple point, however, that Local Rule 33 speaks specifically to attorneys' fees, which are exactly what are being requested here, whether or not they are classified as costs or put in some other category. The district court and Circuit Court on appeal, respectfully, incorrectly failed to enforce the plain language of the rule.

While the language of Section 1988 allows for attorneys' fees "as part of costs," the case law makes clear that the application for attorneys' fees is to governed by applicable local rule. In *White, supra*, after holding that Rule 59(e) was inapplicable to Section 1988 fees due to the collateral nature of attorneys' fees, 445 U.S. at 451-53, this Court addressed specifically the way in which timeliness of attorneys' fees can be handled: through local rule of court. The Court noted:

> Section 1988 authorizes the award of attorneys' fees in "[the] discretion of the court." We believe that this

> discretion will support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing the timeliness standards for the filing of claims for attorneys' fees.

455 U.S. at 454. Thus, whether or not there is surprise or prejudice, the *White* Court allowed the matter to be handled by local rule. Therefore, this Court itself has allowed the matter to be handled by local rule, this has been done in Local Rule 33, and the Court below refused to adhere.

Moreover, the Court below ignored the clear ruling that it had earlier made in *Inmates of Allegheny County Jail, supra*, which allows for local rule to control the timeliness for application for attorneys' fees. That Court noted that the timeliness is a matter for the district court's discretion, *absent a local rule establishing a time limit* [emphasis added]. Obviously, *Inmates* was dealing specifically with a Section 1983 claim and a Section 1988 attorneys' fee claim, as was the case earlier in *White* before this Court. Rule 33 was promulgated immediately after the decision set forth in *Inmates*.

Additionally, case law in other Circuits would support the propriety of Section 1988 attorneys' fees being handled by local rule. Cited by the Supreme Court in *White* was the decision in the Eighth Circuit Court of Appeals in *Obin v. District No. 9 of the International Association of Machinists and Arrowspace Workers*, 651 F.2d. 575 (8th Cir. 1981), which allowed for local courts to adopt a separate rule to handle attorneys' fees:

> From both a policy and a legal standpoint, therefore, a claim for attorneys' fees should be treated as a matter

> collateral to and independent of the merits of the litigation. Accordingly, the time limits of a claim for fees should be governed by procedural rules that reflect the collateral and independent nature of the claim rather than by rules, such as a ten day provision of Rule 59(e), that relate to the merits of an action.

651 F.2d. at 583. The *Obin* Court, faced with the language of Section 1983 of "attorneys' fees as part of costs," went on to state that *attorneys' fees* should be governed by local rule [emphasis added]. There is no mention of treating *costs* through local rule. Further, also cited approvingly by the Supreme Court in *White* was the Fifth Circuit Court of Appeals Opinion in *Knighton v. Watkins*, 616 F.2d. 795 (5th Cir. 1980). That Court examined the relationship between a Section 1988 claim for attorneys' fees and Federal Rule of Civil Procedure 54(d), which provides for the award of costs, but which does not specify a time period within which the motion for costs must be made. The Court highlighted both the need for local rule to govern Section 1988 attorneys' fees and the basic, fundamental difference between attorneys' fees and costs:

> We are aware that, while Rule 54(d) of the Federal Rules of Civil Procedure permits costs to be taxed by the Clerk of Court in the first instance, Section 1988 allows attorneys' fees to be added as part of the costs only in the discretion of the district judge who must consider the *Johnson* factors before doing so. There will be, therefore, some distinction between the practice governing an award for other costs and that governing an award for attorneys' fees under Section 1988. We feel, however, that the problem can be handled best by local rule. It need not alter our judgment that motions for attorneys' fees are not governed by the strict time limits of Rule 59.

616 F.2d. at 798. Not only does the *Knighton* Court, as does the Supreme Court in *White* through its citation of *Knighton*, recognize the important distinction between attorneys' fees and costs, it leaves the matter to local rule. Clearly, local Rule 33 is intended to avoid surprise or prejudice by a potentially huge claim for attorneys' fees in a Section 1983, or other applicable, action. The Circuit Court herein should not have allowed the fees.

Thus, attorneys' fees pursuant to Section 1983 should not have been awarded in the instant matter, the Circuit Court being in violation of the Local Rules of Court for the Western District of Pennsylvania, the rationale in other circuit opinions, and the express allowance for local rule to control attorneys' fees as espoused by this very Court. At the very least, the disputes as to the interpretation of the various statutes as argued by plaintiffs creates a matter that must be decided by this Court.

III. WHERE AN AWARD OF ONE DOLLAR IS MADE TO EACH OF A LIMITED NUMBER OF SEVERAL PLAINTIFFS AS TO ONLY THREE OF NUMEROUS DEFENDANTS AND ONLY AS TO CERTAIN CLAIMS CONTAINED IN PLAINTIFFS' COMPLAINT, ARE DEFENDANTS ENTITLED TO AN EVIDENTIARY HEARING REGARDING THE APPROPRIATENESS OF CERTAIN ATTORNEYS' FEES CLAIMED UNDER 42 U.S.C. SECTION 1988?

Clearly, many of the items charged by attorneys for plaintiffs in the instant matter were not related directly to the work on the "successful" claims for which one dollar verdicts were rendered. Much of the work charged by

plaintiffs in their claim for attorneys' fees involved work related to, for example, the completely unsuccessful claims for medical mistreatment. Additionally, many of the claims for attorneys fees set forth in plaintiffs' motion below are greatly disputed by the County defendants as set forth in their answer to said motion. Nonetheless, though these defendants made demand for an evidentiary hearing with respect to the propriety of various charges, the district court did not permit an evidentiary hearing but rather simply reduced the inital claim for attorneys' fees of $89,152.43 and awarded $41,764.47 to plaintiffs. The appeal filed on behalf of the defendants resulted in the affirmance of the district court's ruling.

The district court and the Court of Appeals abused their discretion in awarding plaintiffs $41,764.47 in costs pursuant to 42 U.S.C. Section 1988. At the district court level, the court reviewed the billable hours as set forth in the schedules filed as part of plaintiffs' Motion for Fees. The Court acknowledge that Schedule C listed a detailed scope of the individual attorney who performed the specific tasks as outlined, noting the hours expended, and the cost per hour. While the defendants have not challenged the rate charged per hour by the attorneys involved, they do attack other aspects of the hours and total billable amounts. The district court recognized that there were specific hours and amounts set as to each of the three attorneys who worked on the case and trial, and that a fifty percent lode star of $29,717.48 was added to the normal billing rates which totaled $59,434.95. The Court properly eliminated the lode star amount in light of plaintiffs' limited success at trial.

While the district court recognized that some of the charges in the hourly billing as outlined in Schedule D

attached to plaintiffs' Motion seemed excessive, the Court failed to review each individual hour to determine whether or not the time expended entitled the "prevailing party" to recover attorneys' fees because of success on a significant issue central to the case. This procedure, as upheld by the Circuit Court, is clearly in violation of this Court's own previously cited case *Hensley v. Eckerhart, supra,* the Supreme Court therein basically adopting a two-step approach for courts to examine and or reduce compensable hours where an award is to be made pursuant to Section 1988. In this case, initially, a complaint was made as to medical treatment, contact visitations, etc. Plaintiffs below asserted that this reflected a "totality" of conditions and would reflect in the fees assessed, however the fact is that each of these areas became a distinct legal issue with a separate analysis involved, as evidenced by the Court's dismissal of claims based on medical treatment. Had the fees been recorded properly by plaintiffs' attorneys, the work of the medical issues could be easily extracted from the bills. As the Court in *Hensley* noted:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from its successful claim, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorneys' fees reduced simply because the district court did not adopt each contention raised. Where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

See, Inmates, supra, at 180. With the numerous claims being made on behalf of six or eight separate plaintiffs, it

becomes the duty of the Court to decide if plaintiffs prevail. Petitioners contend that plaintiffs prevailed on no issues, thus there should have been no attorneys' fees awarded at all. If plaintiffs are seen as "prevailing" on any issues, then the fees must be carefully examined.

Further, in the defendants Answer to the Motion Requesting Fees as filed by the plaintiffs, defendants request an evidentiary hearing on the matter and such hearing was never granted. Instead, after reviewing various briefs filed by the parties, the Court entered its Order on November 9, 1986 just a few days before the decision in plaintiffs' Appeal on other issues was entered by the Third Circuit. The district court did not give any reasoning in detail concerning the adjustment of the fees to be paid plaintiffs' counsel other than that the actual attorneys' fees claimed at $59,434.95 should be reduced by thirty percent to $41,604.47, the ultimate amount awarded by the district court. It is unclear as to how the district court arrived at the thirty percent figure in lieu of the schedules as presented by the plaintiffs, and apparently, there had been no particular deletion of those claims for time and work done on specific unsuccessful portions of the claim. The Circuit Court's upholding of this procedure was clearly in violation of the mandates of *Hensley* and further contravened the procedure to be strickly followed by courts in this situation as outlined in the *Inmates* case, *supra.*

The method followed below is also inappropriate in light of the procedure set forth in other circuits. In *King v. Greenblatt*, 560 F.2d. 1024 (1st Cir. 1977) *cert. den.* 438 U.S. 916 (1977), the court held that "reasonable attorneys' fees," as provided for in 42 U.S.C. Section 1988, were not to be computed at the rate established by the Criminal Justice Act (18 U.S.C. Sections 3006(A)(d)(1)), but should

take into account the following twelve factors: (1) Time and labor required; (2) Novelty and difficulty of questions presented; (3) Skill required to perform legal services; (4) Preclusion of other employment by attorney due to acceptance of case; (5) Customary fee in community; (6) Whether fee is fixed or contingent; (7) Time limitations imposed by client or circumstances; (8) Amount involved in results obtained; (9) Experience, reputation and ability of attorney; (10) Undesirability of case; (11) Nature in length of relationship with client; (12) Awards in similar cases. Obviously this was not done. See also the Fourth Circuit decision in *Anderson v. Morris*, 658 F.2d. 246 (4th Cir. 1981). Clearly, an extremely important factor is the degree of success obtained by plaintiffs, especially critical in the instant matter in light of the verdicts rendered. It is clear that the court did not review the attorneys' fees with the requisite degree of care required by this very Court and the courts in other circuits, as well as in its own circuit, and therefore the Court of Appeals ruling on this matter should allow this Court to grant the foregoing Petition on that ground.

CONCLUSION

The Third Circuit decision is a departure from established federal precedent, precedent established by this very Court, the Third Circuit itself and other Circuit Courts of Appeals. Additionally, the issues involved in this matter are of a disputed nature and have not been specifically addressed by this Court in the past, though the intent of the Court on these issues does appear to be clear. In any event, the matters do involve important federal questions which have not been, but should be, addressed specifically by this Court. Therefore, it is requested that this Petition for Writ be granted and this matter considered by the Supreme Court.

Respectfully submitted,

WAYMAN, IRVIN & McAULEY

By ..... CATHIE J. FAGAN .....

Cathie J. Fagan, Esquire
Attorneys for Petitioners
A Member of the Bar of this Court

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-3798

TERRY ALAN BORING

v.

CHARLES J. KOZAKIEWICZ, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 81-1446)
District Judge: Hon. Glenn E. Mencer
Argued
May 5, 1988

Before: GIBBONS, *Chief Judge,* MANSMANN and COWEN, *Circuit Judges*

CATHIE J. FAGAN, ESQ. (ARGUED)
WAYMAN, IRVIN & McAULEY
Suite 1624 Frick Building
Pittsburgh, Pennsylvania 15219

Attorneys for Appellants

LYNN J. ALSTADT, ESQ.
THOMAS R. SHAFFER, ESQ.
MICHAEL L. DEVER, ESQ. (ARGUED)
322 Boulevard of the Allies
Pittsburgh, Pennsylvania 15222

Attorneys for Appellees

JUDGMENT ORDER

In this civil rights action complaining about conditions in the Allegheny County Jail, the defendants appeal from an award of attorneys fees pursuant to 42 U.S.C.§1988. They contend that the court erred in making such an award (1) because plaintiffs were not the prevailing party; (2) because the motion for costs was untimely, and (3) because the amount awarded is excessive. We have carefully considered all these contentions and find them to be without merit.

It is ORDERED and ADJUDGED that the judgment of the District Court is affirmed. Costs are taxed in favor of appellees.

BY THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: June 8, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY ALAN BORING, et al.,
Plaintiffs,
v.
CHARLES J. KOZAKIEWICZ, et al.,
Defendants.

Civil Action No. 81-1446

ORDER

AND NOW, this 9th day of November, 1987, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that plaintiffs' Motion Requesting Costs is GRANTED and that defendants Charles J. Kozakiewicz, Gary Knotts, and Edward DeSabato shall pay Plaintiffs' counsel a sum of $41,764.47 as reasonable costs.

/s/ GLENN E. MENCER
United States District Judge

cm: All parties of record. RVB

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY ALAN BORING, et al.,
Plaintiffs,
v.
CHARLES J. KOZAKIEWICZ, et al.,
Defendants.

Civil Action No. 81-1446

MEMORANDUM OPINION

The above captioned case is a civil rights case filed to correct allegedly egregious conditions existing at the Allegheny County Jail. The complaint asserted as unacceptable: the general conditions at the jail; medical treatment for the plaintiffs; contact visitation; religious services for plaintiffs incarcerated on disciplinary ranges; meals; access to the law library; access to telephones; and the composition of disciplinary boards. The suit was initially filed *pro se,* but the court appointed counsel to represent the indigent plaintiffs.

After extensive pretrial procedures and a trial on the merits, the jury returned a verdict against three of the defendants and in favor of six of the named plaintiffs. The jury awarded damages against each defendant in the amount of one dollar.

Pursuant to 42 U.S.C. §1988, the plaintiffs made a Motion for Costs requesting $89,152.43 in attorney fees and $160 in transcription costs. 42 U.S.C. §1988 provides in pertinent part that, "In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], . . . the Court, in its discretion, may allow the

prevailing party, other that the United States, a reasonable attorney's fee as part of the costs."

The Supreme Court addressed 42 U.S.C. §1988 in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The Court concluded that the plaintiffs were not automatically entitled to all their expenses. "[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440. Thus, if the plaintiffs' success was limited, then their recovery of attorney fees should also be limited.

In the instant case, the plaintiff's success was unquestionably limited. Although they obtained verdicts against three defendants, the entire award was only three dollars. The plaintiffs' attorneys vigorously and skillfully fought for the plaintiffs' interests, but their victory was nominal. Consequently, this court hesitates to award the plaintiffs the entire amount they have demanded, yet we also hesitate to deny them costs entirely. In light of the circumstances, therefore, this court will exercise the discretion explicit in 42 U.S.C. §1988 and award the plaintiffs an amount reduced in proportion to their quantum of success.

The plaintiffs included a detailed schedule of their expenses. Schedule C lists actual attorney fees at normal billing rates totalling $59,434.95 and a fifty percent lodestar of $29,717.48. This court will eliminate the lodestar in light of the plaintiffs' limited success. Schedule D is a breakdown of the actual time that plaintiffs' attorneys spent on this case. Although this court does not doubt that the attorneys actually performed the tasks listed on the schedule, some of the charges seem excessive, considering the relief obtained by the plaintiffs. In particular, this court hesitates to bill the defendants for three attorneys at the

counsel table, and for some of the miscellaneous items such as the telephone conversation with a reporter from the Pittsburgh Press and time spent unpacking bags. In the court's judgment, the plaintiffs' demands for their actual attorney fees of $59,434.95 should be reduced by thirty percent to $41,604.47. Thus, the total amount to which the plaintiffs attorneys are entitled is $41,764.47, representing $41,604.47 in attorney fees and $160.00 in transcript costs. We feel that this amount more accurately reflects the amount of success achieved by the plaintiffs.

The defendants have raised the issue of whether the plaintiffs filed their motion for costs within the time limits established by the Federal Rules of Civil Procedure and the Local Rules of Court of the United States District Court for the Western District of Pennsylvania. The plaintiffs filed their Motion for Costs forty-three days after the judgment. The costs demanded by the plaintiffs consisted almost entirely of attorney fees (99.8% of their total figure), and the defendants urged this court to rule the motion untimely under Local Rule 33 (requiring motions for attorney fees to be filed within ten days of judgment).

The defendants cite *Inmates of Allegheny County Jail v. Pierce,* 717 F.2d 177 (3d Cir. 1983), to support their claim that the motion was untimely. *Pierce* originated in the Western District of Pennsylvania, but Local Rule 33 was not in effect at the time. *Pierce* holds that the timeliness of an application for attorney fees is a matter for the court's discretion, absent a local rule establishing a time limit. *Id.* at 179. The defendants contend that Local Rule 33 removes the discretion from the court under the *Pierce* rule.

However, the combination of 42 U.S.C. §1988 and F.R.C.P. 54(d) gives the court discretion to consider the

attorney fees as part of costs and avoid the harsh consequences of Local Rule 33 in the instant case. F.R.C.P. 54(d) provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, *costs* shall be allowed as of course to the prevailing party unless the court otherwise directs." (emphasis added). 42 U.S.C. §1988 provides that ". . . the Court, in its discretion, may allow a reasonable attorney's fee as part of the costs."

The defendants have not shown any unfair surprise or prejudice resulting from the forty-three day period between the judgment and the motion. Therefore, this court will exercise its discretionary powers and enter an order awarding the plaintiffs costs in the amount of $41,764.47.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY ALAN BORING, et al.,
Plaintiffs,
v.
CHARLES J. KOZAKIEWICZ, et al.,
Defendants.

Civil Action No. 81-1446

ORDER

AND NOW, this 29th day of October, 1986, the above-captioned case having been tried to a jury and in accordance with the verdict of said jury,

IT IS HEREBY ORDERED that:

(1) Judgment is entered in favor of Terry Alan Boring and against Charles J. Kozakiewicz in the amount of $1.00;

(2) Judgment is entered in favor of Terry Alan Boring and against Gary Knotts in the amount of $1.00;

(3) Judgment is entered in favor of Terry Alan Boring and against Edward Desabato in the amount of $1.00;

(4) Judgment is entered in favor of Andre Calhoun and against Charles J. Kozakiewicz in the amount of $1.00;

(5) Judgment is entered in favor of Andre Calhoun and against Gary Knotts in the amount of $1.00;

(6) Judgment is entered in favor of Andre Calhoun and against Edward Desabato in the amount of $1.00;

(7) Judgment is entered in favor of Weldon Fells and against Charles J. Kozakiewicz in the amount of $1.00;

(8) Judgment is entered in favor of Weldon Fells and against Gary Knotts in the amount of $1.00;

(9) Judgment is entered in favor of Weldon Fells and against Edward Desabato in the amount of $1.00;

(10) Judgment is entered in favor of Dale E. Geidel and against Charles J. Kozakiewicz in the amount of $1.00;

(11) Judgment is entered in favor of Dale E. Geidel and against Gary Knotts in the amount of $1.00;

(12) Judgment is entered in favor of Dale E. Geidel and against Edward Desabato in the amount of $1.00;

(13) Judgment is entered in favor of Ronald Perry and against Charles J. Kozakiewicz in the amount of $1.00;

(14) Judgment is entered in favor of Ronald Perry and against Gary Knotts in the amount of $1.00;

(15) Judgment is entered in favor of Ronald Perry and against Edward Desabato in the amount of $1.00;

(16) Judgment is entered in favor of David Beatty and against Charles J. Kozakiewicz in the amount of $1.00;

(17) Judgment is entered in favor of David Beatty and against Gary Knotts in the amount of $1.00;

(18) Judgment is entered in favor of David Beatty and against Edward Desabato in the amount of $1.00;

(19) Judgment is entered in favor of Lt. Matthew Kerr, Lt. James Gregg, Lt. Urban, Lt. Ralph Lagrotto, Sgt. Callas Smith, Sgt. Elijah Rucker, Corporal Istivan Balogh, Corporal Augustine, Officers McMasters, McNeely, Williams, Brokoff, McCaffery, Dillinger, Jobes Manuel, Indovina, Aziz, Barum and Cielinski, Katherine O'Connor, Thomas Foerster, Cyril Wecht, William Hunt, Frank Lucchino, Msgr. Charles Rice, Eugene Coon, Honorable Michael J. O'Malley, Honorable Patrick R. Tamilia, Honorable Marion Finkelhor, and Harriette McCray and against all Plaintiffs; and

(20) Judgment is entered in favor of Kozakiewicz, Knotts, Desabato and against Plaintiffs Philip Meighan and Prentiss Johnson.

. . . /s/ GLEN E. MENCER . . .
United States District Judge

cm: All parties of record. RVB

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY ALAN BORING, et al.,
Plaintiffs,
v.
CHARLES J. KOZAKIEWICZ, et al.,
Defendants.

Civil Action No. 81-1446

ORDER

AND NOW, this 3rd day of November, 1986, to better reflect of record rulings that this Court made on October 24, 1986 relative to oral motions for directed verdict,

IT IS HEREBY ORDERED that Judgment is entered in favor of the following defendants, Marshall Johnson, M.D., Nurse Coleman, Nurse Schroder, Dr. Ranii, and Allegheny County and against all of the Plaintiffs.

. . /s/ GLENN E. MENCER . . .
United States District Judge

cm: CATHIE FAGAN, ESQUIRE
THOMAS SHAFFER, ESQUIRE
JEFFREY TINDALL, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY ALAN BORING, et al.,
Plaintiffs,
v.
CHARLES J. KOZAKIEWICZ, et al.,
Defendants.

Civil Action No. 81-1446

MOTION REQUESTING COSTS

Pursuant to 42 U.S.C. §1988, plaintiffs respectfully request that this Court award to plaintiffs against defendants Charles J. Kozakiewicz, Gary Knotts and Edward DeSabato plaintiffs' costs as set forth in Schedule A.

Schedule A sets forth those costs recoverable pursuant to 42 U.S.C. §1988. These costs include transcription costs for the tape recorded depositions of Marshall Johnson, M.D., and Charles J. Kozakiewicz as set forth in Schedule B and attorney fees as set forth in Schedule C.

Schedule B reflects the costs of in-house transcription of the tape recorded depositions of Marshall Johnson, M.D., and Charles J. Kozakiewicz. Portions of both depositions were read into the record at trial. A rate of $2.00 per page was used to determine the costs of transcription. This rate is a reasonable and accepted rate for reporters in the Western District of Pennsylvania.

Schedule C reflects the hours expended by each of plaintiffs' attorneys, and their law clerks, in the successful prosecution of this action. Hourly rates are presented for each of plaintiffs' attorneys and their clerks. Because these hourly rates do not reflect the contingent nature of the

success of this action, plaintiffs have added a 50% multiplier to the attorney fee total to reflect this contingency. The application of such a multiplier is permitted under *Hall v. Borough of Roselle,* 747 F.2d 838, 841-43 (3rd. Cir. 1984).

Schedule D sets forth the date, description, attorney and time spent for each item for which plaintiffs now seek attorney fees.

Plaintiffs respectfully request that this Court award plaintiffs their reasonable costs as set forth in Schedule A.

Respectfully Submitted,

/s/ LYNN J. ALSTADT

LYNN J. ALSTADT
THOMAS R. SHAFFER
MICHAEL L. DEVER
322 Boulevard of the Allies
Pittsburgh, Pennsylvania 15222
(412) 471-1590

Attorneys for Plaintiffs

SCHEDULE A

Total Costs

Transcription Costs (See Schedule B)	$ 160.00
Attorney Fees (See Schedule C)	$89,152.43
Total	$89,312.43

SCHEDULE B

Transcription Costs

Deposition	Pages		Rate		Total
Marshall Johnson	24	×	$2.00	=	$ 48.00
Charles J. Kozakiewicz	56	×	$2.00	=	$112.00
			Total		$160.00

SCHEDULE C

Attorney Fees

Attorney	Time		Rate		Total
Lynn J. Alstadt (LJA)	204.63 hr.	×	$100/hr.	=	$20,463.00
Thomas R. Shaffer (TRS)	337.32 hr.	×	$ 85/hr.	=	28,672.00
Michael L. Dever (MLD)	113.35 hr.	×	$ 75/hr.	=	8,501.25
Law Clerk (CD)	51.95 hr.	×	$ 30/hr.	=	1,558.50
Law Clerk (BF)	8 hr.	×	$ 30/hr.	=	240.00
			Total		$59,434.95
			+ 50% Multiplier		$29,717.48
			Total Requested		$89,152.43

SCHEDULE D

BORING ET AL. V. KOZAKIEWICZ ET AL.
Civil Action No. 81-1446

Date	Description	Atty	Time
1-25-82	Review Complaint; outline causes of action	LJA	1½ hr.
1-26-82	Legal research	LJA	1½ hr.
1-27-82	Meeting w/Terry Boring	LJA	1 hr.
	Meeting w/Andre Calhoun	LJA	2 hr.
	Telephone discussion with Magistrate Mitchell's law clerk	LJA	¼ hr.
	Legal research	LJA	¼ hr.
1-28-82	Check of Court files	LJA	2 hr.
1-29-82	Meeting w/J. Krakoff	LJA	½ hr.
1-30-82	Review Court file of documents filed by inmates; read Bell v. Wolfish	LJA	3½ hr.
2-2-82	Dictate letter to Biondo; dictate memo to clients; draft Motion for Leave to File Amended Complaint	LJA	1½ hr.
2-3-82	Revise memo and Motion	LJA	1½ hr.

Date	Description	Atty	Time
2-9-82	Draft letter to Dale Geidel	LJA	1/2 hr.
2-11-82	Revise letter to Geidel & send	LJA	1/2 hr.
2-16-82	Begin draft of Amended Complaint	LJA	1 1/2 hr.
2-17-82	Draft Amended Complaint	LJA	1 hr.
2-18-82	Meeting w/Geidel; revise Amended Complaint	LJA	1 hr.
2-23-82	Re-draft Amended Complaint	LJA	2 hr.
2-24-82	Telephone discussion w/Biondo; Draft Amended Complaint	LJA	1 hr.
2-26-82	Meeting w/Calhoun	LJA	1 hr.
3-1-82	Revise Amended Complaint;	LJA	1 hr.
	Jail tour	LJA	5 hr.
3-4-82	Meeting w/Boring	LJA	2 hr.
3-15-82	Review correspondence from clients	LJA	1/4 hr.
3-19-82	Meeting w/Geidel	LJA	2 hr.
3-20-82	Revise Amended Complaint	LJA	2 hr.

Date	Description	Atty	Time
3-21-82	Legal research; redraft causes of action	LJA	6 hr.
3-23-82	Revise Amended Complaint; draft memo	LJA	1½ hr.
3-26-82	Revise Amended Complaint; Meeting w/Geidel, Calhoun & Fells	LJA	4 hr.
3-27-82	Meeting w/Boring; Revise Amended Complaint	LJA	6 hr.
3-29-82	Revise and file Amended Complaint; Letter to Biondo	LJA	1½ hr.
3-30-82	Telephone discussion w/Clerk re filing Third Amended Complaint draft memo to clients enclosing Third Amended Complaint	LJA	¾ hr.
3-31-82	Telephone discussion w/Boring; Note to Boring & Calhoun; draft acceptance of service	LJA	1 hr.

Date	Description	Atty	Time
4-2-82	File Acceptance of Service for many Defendants; prepared Summons for remaining Defendants	TRS	1½ hr.
4-5-82	Meeting w/Geidel; obtain summons from Clerk	LJA	2 hr.
4-15-82	Status discussion w/T. Shaffer	LJA	3 hr.
4-15-82	Meeting w/LJA regarding service and case	TRS	3 hr.
4-16-82	Attempted to serve Summons & Complaint on Huang, Whitehead and Judge Tomallia - unsuccessful	TRS	2 hr.
4-16-82	Draft report to clients re status	LJA	1 hr.
4-23-82	Meeting w/Biondo	LJA	2 hr.
4-30-82	Meeting w/Boring	LJA	2 hr.
5-5-82	Status Conference	LJA	2½ hr.
5-11-82	Draft memo to clients re status conference	LJA	2 hr.
5-20-82	Jail visit; letter to Biondo; draft memo to clients re jail visit	LJA	2½ hr.

Date	Description	Atty	Time
5-25-82	Revise memo to clients re jail visit	LJA	1/4 hr.
6-10-82	Letter to Calhoun	LJA	1/4 hr.
6-11-82	Made copies of Complaint and had Summons issued	TRS	1 hr.
6-14-82	Served Summons and Complaint on Msgr. Charles Rice and Dr. Foster and attempted to serve Birdie Coleman	TRS	3 1/2 hr.
6-15-82	Attempted to serve Summons and Complaint on McCrey and Augustine	TRS	1/2 hr.
6-16-82	Served Summons and Complaint on James Augustine	TRS	1/2 hr.
6-17-82	Filed return of service forms	TRS	1/2 hr.
6-21-82	Discussion w/T. Shaffer re service	LJA	1 hr.
6-21-82	Meeting w/LJA re service of Complaints	TRS	1 hr.
6-23-82	Discuss service w/T. Shaffer	LJA	1/4 hr.

Date	Description	Atty	Time
6-23-82	Preparation of Marshall's forms and Summons for Ronald Marks; had same issued and delivered to U.S. Marshall	TRS	1 hr.
6-25-82	Draft memo; telephone discussion w/Biondo	LJA	1 hr.
7-4-82	Letter to Geidel	LJA	1/2 hr.
7-6-82	Prepare and file Motion to Extend Time to Response to Defendants Motion to Dismiss; serve Biondo	TRS	1 1/2hr.
7-14-82	Read Defendants Brief in Support of Motion to Dismiss; began legal research on same	TRS	3 hr.
7-15-82	Began preparation of Response to Defendants' Motion to Dismiss	TRS	3 hr.
7-16-82	Finish 1st draft of Response to Defendant's Motion to Dismiss for review by LJA	TRS	4 hr.

Date	Description	Atty	Time
7-19-82	Research 42 U.S.C. §1985 3 for Response to Defendants' Motion to Dismiss; finished draft of same	TRS	1 hr. 40 min.
7-20-82	Proofed draft; shepardized cases cited	TRS	20 min.
7-26-82	Revise Response to Defendants' Motion to Dismiss	LJA	2 hr.
8-18-82	Read *Procunier v. Navarett* cited as authority for qualified immunity aff. defense for Dft. Marks	TRS	1 hr. 20 min.
8-19-82	Reviewed Brief in Support of Dft. Marks' Motion to Dismiss; began 1st draft of Plaintiffs Response thereto	TRS	3½ hr.
8-20-82	Review and revise Response to Defendants' Motion to Dismiss	LJA	1½ hr.
8-20-82	Finished reply Brief to Dft. Marks Motion to Dismiss; made revisions thereto	TRS	1 hr. 10 min.

Date	Description	Atty	Time
8-23-82	Put Brief in final form; made copies; filed same; sent copies to Cuebas; Biondo; Boring & Calhoun	TRS	1 hr.
8-26-82	Meeting w/Judge Bloch	LJA	2 hr.
10-4-82	Oral Argument on Motion to Dismiss; Meeting w/Boring	LJA	3½ hr.
10-4-82	Attended Oral Argument on Dfts. Motion to Dismiss Ptfs. Third Amended Complaint	TRS	2¼ hr.
10-29-82	Reviewed Dfts. Supplemental Brief in support of Motion to Dismiss	TRS	10 min.
11-4-82	Began response Brief in Opposition to Dfts. Supplemental Brief in Support of Motion to Dismiss	TRS	2 hrs.
11-9-82	Completed 1st draft of Brief in Opposition to Dfts. Brief in Support to Motion to Dismiss	TRS	5½ hrs.

Date	Description	Atty	Time
11-10-82	Discussed with LJA revisions to Brief in Opposition to Dfts. Supplemental Brief in Support of Motion to Dismiss	TRS	10 min.
11-10-82	Meeting w/TRS re Brief in Opposition to Dfts. Supplemental Brief in Support of Motion to Dismiss	LJA	10 min.
11-11-82	Review Brief	LJA	1/2 hr.
11-11-82	Proofed Brief; redraft of same	TRS	1/2 hr.
11-12-82	Revise brief	LJA	1/2 hr.
11-12-82	Filed Brief	TRS	1/4 hr.
3-1-83	Letter	LJA	1/4 hr.
4-12-83	Telephone discussion w/O'Brien; telephone discussion w/Shrager; check files re law library	LJA	2 hr.
4-20-83	Review files; telephone discussion to locate Boring	LJA	1 1/2 hr.
7-7-83	Discussion w/M. Dever	LJA	1/2 hr.
7-7-83	Meeting w/LJA	MD	1/2 hr.

Date	Description	Atty	Time
8-24-83	Review Magistrate's report; draft memo and letter	LJA	1½ hr.
8-26-83	Read Cohill's Opinion; Magistrate's report; researched and drafted exceptions and Brief thereto	TRS	6 hrs.
8-29-83	Revise exceptions and memo	LJA	2 hr.
9-2-83	Revise memo; check for filing; letter to Boring	LJA	½ hr.
9-6-83	Reviewed Brief and Ptfs. exceptions to Magistrate's report; returned call to Jose Cuebas; placed call to Biondo	TRS	½ hr.
9-10-83	Review order; draft memo and letter	LJA	½ hr.
10-18-83	Studied Biondo's Answer to Complaint	TRS	2 hr.
10-24-83	Status conference	LJA	2½ hr.
10-24-83	Status conference; preparation of Consent Decree; began list of remaining issues	TRS	7 hr.

Date	Description	Atty	Time
10-25-83	Preparation of draft of Summary of Remaining Issues; Combine w/Consent Decree to produce document entitled Preliminary Pre-Trial Statement	TRS	1¾ hr.
		TRS	1 hr.
10-26-83	Proofed and redrafts of Consent Decree and Preliminary Pre-Trial Statement documents	TRS	1⅓ hr.
10-27-83	Review proposed Request for Production and revise	LJA	½ hr.
10-27-83	Correction of documents; review of LJA comments to Request for Production; reviewed Allegheny County Jail Handbook	TRS	2 hrs.
10-31-83	Proofed Request for Production of Documents; filed same; call to State Correctional Ins. at Pittsburgh for Calhoun Inmate number	TRS	1 hr. 10 min.

Date	Description	Atty	Time
11-1-83	Telephone call w/Boring; letter to Boring and Calhoun	LJA	1/2 hr.
11-1-83	General discussions w/LJA concerning case	TRS	10 min.
11-1-83	Meeting w/TRS regarding case	LJA	10 min.
11-3-83	Meeting w/Biondo	LJA	1 1/4 hr.
11-3-83	Meeting w/LJA and Biondo re Preliminary Pre-Trial Statement; Proofed revised version of document	TRS	2 hr.
11-4-83	Letter to Biondo; review of Preliminary Pre-Trial Statement	TRS	20 min.
11-17-83	Letter to Boring and Calhoun re Preliminary Pretrial Statement	LJA	1/4 hr.
11-18-83	Review of Stipulation rec'd from Cuebas re Hearing Board procedures, etc.	TRS	35 min.
11-28-83	Letter; discussion with TRS	LJA	3/4 hr.

Date	Description	Atty	Time
11-28-83	Call from Biondo re production at ACJ; reviewed Ptf. Geidel's App. for Reconsideration; draft of ltr. to Geidel; call to Mitchell's office; prepared release documents; proofed letters and made copies; discussion w/LJA	TRS	2 hr. 40 min.
12-5-83	Review of Biondo response to our Request for Production; made copies; organized blackbook	TRS	1/2 hr.
12-6-83	Prepare for and attend production of documents at ACJ	TRS	3 hr.
12-19-83	Draft Correspondence	LJA	1/4 hr.
1-18-84	Call to Biondo re copies of discovery materials	TRS	10 min.
1-27-84	Review of information rec'd from Biondo	TRS	35 min.
2-2-84	Review documents	LJA	1 hr.
2-14-84	Prepare for and attend Status Conference	LJA	1 hr.

Date	Description	Atty	Time
2-14-84	Status conference	TRS	3/4 hr.
2-15-84	Draft memo to clients re discovery; letter to Davin	LJA	1 hr.
2-15-84	Review of Court Order invoking Local Rule 5-II; read rule and made time computations; prepared Motion and Order to allow taping of depositions; call to Magistrate Mitchell to record LJA proper address; filed Motion	TRS	2 hr.
2-24-84	Set up conference room for Boring and wrote note to client	TRS	1/2 hr.
2-29-84	Discussions w/Boring	LJA	3 1/2hr.
2-29-84	Discussions w/Boring and LJA; general matters relating to case	TRS	3 1/2 hr.
3-1-84	Identified individuals not yet served; discussed with LJA; prepared letter to Biondo; Appearance for TRS	TRS	1 1/2 hr.
3-1-84	Discuss service w/TRS	LJA	1/4 hr.

Date	Description	Atty	Time
3-2-84	Proofed and mailed letters; Appearance and Notice of Depo.	TRS	40 min.
3-16-84	Prepare for and attend deposition of Kozakiewicz	LJA	6 hr.
3-16-84	Prepared for and attended deposition of Kozakiewicz	TRS	5 hr.
4-19-84	Read transcript of Kozakiewicz deposition; identified additional documents; dictated 2nd Request for Production and brief digest of deposition	TRS	5 hr.
4-23-84	Review Request for Production	LJA	1/4 hr.
4-23-84	Review 2nd Request for Production; dictated letters to Biondo, Davin and clients; prepared Notice of Depositions	TRS	2 hr.
4-25-84	Finalized and sent out discovery documents	TRS	1 1/2 hr.

Date	Description	Atty	Time
4-26-84	Call from Biondo re availability of Gaines and Foster and if he accepted service for them	TRS	1/4 hr.
4-27-84	Check of blackbook and file re Biondo acceptance of service for Gaines but not for Foster	TRS	35 min.
4-30-84	Call from Biondo re Gaines and Foster depositions	TRS	1/4 hr.
5-9-84	Call from Biondo - couldn't locate Gaines; attempted call to Boring re postponement of deposition	TRS	1/4 hr.
5-10-84	Attempted call to Boring re postponement of Gaines deposition	TRS	5 min.
5-14-84	Call to Gaines; letter to Calhoun; tried to call Boring	TRS	20 min.

Date	Description	Atty	Time
5-16-84	Call from Jerome Iwler re attendance at Friday deposition; call to Biondo; organized file and information in preparation for Friday deposition	TRS	2 hr.
5-17-84	Research and preparation for deposition of Dr. Foster	TRS	4 hr.
5-18-84	Made copies of exhibits and final preparation for deposition; deposition of Dr. Foster	TRS	3 hr.
6-5-84	Attempted to call Biondo; review of materials to present to Robert Vitale (Bob); letter to Boring	TRS	2 hr.
6-7-84	Review of letter to Boring; review of Motion to Extend Time for Discovery	TRS	1/2 hr.
6-8-84	Calls to Boring and Davin for consent to extension; sent out Motion	TRS	1/2 hr.

Date	Description	Atty	Time
6-27-84	Draft letters to Biondo and Davin; memo to clients; Notice of Deposition for Dr. Johnson; proofed same	TRS	2 hr.
7-3-84	Attempted call to Biondo re Johnson deposition; checked status of transcript of Foster deposition; revised and mailed memo to clients	TRS	1/2 hr.
7-6-84	Call from Biondo to arrange Dr. Johnson deposition; began inspection of documents at ACJ w/Bob; prepared Notice of Deposition and letters	TRS	4 hr.
7-9-84	Finished document inspection at ACJ w/Bob	TRS	3 hr.
7-17-84	Attempted call Desabato and Biondo re documents and Dr. Johnson's deposition; began review of transcript of Foster deposition	TRS	2 hr. 20 min.

Date	Description	Atty	Time
7-18-84	Finished proofing transcript of Foster deposition; prepared for Johnson deposition	TRS	4 hr.
7-19-84	Deposition of Dr. Johnson; review of Defendants' Interrogatories to the Plaintiffs; memo to clients enclosing same; review of documents received from Biondo	TRS	3¾ hr.
7-27-84	Review draft of Johnson transcript; corrections to same; dictate cover letters for Foster transcript	TRS	1 hr. 25 min.
8-1-84	Review of Prentis Johnson, Jr.'s Answers to Plaintiffs' Interrogatories	TRS	¼ hr.
8-2-84	Sent out Foster deposition to Defendants and clients	TRS	¼ hr.
8-7-84	Attempted call to Boring; review of Calhoun's Answers to Defendants' Interrogatories	TRS	1 hr.

Date	Description	Atty	Time
8-9-84	Daily attempts to call client 8-6-84 thru 8-9-84	TRS	20 min.
8-14-84	Began a comprehensive review of case	TRS	3½ hr.
8-15-84	Continued review of case; call from Boring; attempted call to Biondo re our answers will be late	TRS	1½ hr.
8-21-84	Call from Biondo; memo to file re Plaintiffs' Answers to Defendants' Interrogatories	TRS	¼ hr.
8-24-84	Meeting w/Boring	LJA	1½ hr.
8-24-84	Meeting w/Boring and LJA; review of documents provided	TRS	3½ hr.
8-27-84	Began compiling Answers to Interrogatories; call to Records and Statistics for Bureau of Corrections re address for Meighan and Voss	TRS	6 hr.

Date	Description	Atty	Time
8-28-84	Call to Records and Statistics for address for Beatty, Voss, Perry and Robinson; call to West Penn Hospital re medical records of Beatty; call to Greensburg Hospital for Beatty records; completed dictation of Answers to Interrogatories; memos to file and to clients	TRS	4½ hr.
8-29-84	Discussion w/TRS re discovery and pretrial statement	LJA	¼ hr.
8-29-84	Began preparation of Statement of Facts for pre-trial narrative statement; obtained current address for Perry; two calls from Boring; attempted to locate Meighan; call to St. Francis Hospital re release of Boring medical records	TRS	4 hr.
8-30-84	Review interrogatory answers	LJA	1 hr.

Date	Description	Atty	Time
8-30-84	Attempted call to Tim O'Brien re refusal to allow Pa. Prison Soc. access to ACJ; attempted to contact Pa. Prison Soc.; letter to Boring enclosing medical release form and material from Fells; preparation of medical release form for Boring; again attempted to locate medical records of Beatty; review of memos to clients and letters enclosing Johnson deposition; worked on witness list and list of issues; finished Pre-Trial Narrative Statement	TRS	5 hr.
8-31-84	Began to compile exhibits	TRS	7 hr.
9-3-84	Finished compiling exhibit list for Pre-Trial Narrative Statement	TRS	3½ hr.

Date	Description	Atty	Time
9-4-84	Proofed redraft of Answers to Interrogatories and Pre-Trial Narrative Statement and attachments therefor; prepared same for filing and filing thereof; began review of book "Rights of Prisoners"	TRS	4 1/4 hr.
9-5-84	Continued review of "Rights of Prisoners" book; preparation of Petition for Funds for Expert Witnesses and Requests for Admission; revise memos to clients; sent out Dr. Johnson deposition	TRS	5 hr.
9-6-84	Proofed and sent out memos to clients	TRS	1/4 hr.
9-11-84	Discussed Request for Admission and Petition for Funds w/LJA; revisions in same	TRS	1 1/2 hr.

Date	Description	Atty	Time
9-12-84	Review of letter from Atty. Iwler re Foster transcript; review of Foster tape; letters to Iwler, Biondo and Davin	TRS	1 hr. 20 min.
9-13-84	Calls to Western Penn Hospital and Mercy Hospital re Boring medical records; letter to Boring; began research re funds for experts; call to Tim O'Brien and Gerry Krakoff re funds for experts	TRS	2 hr.
9-24-84	Filed Request for Admission with Clerk of Courts	TRS	50 min.
9-27-84	Letter to Boring; memo to clients	TRS	1/2 hr.
10-11-84	Review of Jean Davin's Pre-Trial Narrative Statement	TRS	20 min.

Date	Description	Atty	Time
10-12-84	Review letters to Boring and Calhoun enclosing Jeffes Narrative Statement and Boring medical records	TRS	20 min.
	Research re Petition for Funds	TRS	3 hr.
10-16-84	Proof of Petition for Funds; memo and letter to clients; review of Magistrate's letter re jury trial options; discussion w/LJA - revision and procedure	TRS	1 hr.
10-23-84	Letters to Boring and Calhoun	TRS	½ hr.
10-24-84	Review of letter from Biondo and Pre-Trial Narrative Statement	TRS	40 min.
10-26-84	Call from Boring re jury trial; call to Magistrate Mitchell's office; letter to Magistrate Mitchell; letter to St. Francis Hospital; letter to Boring	TRS	1 hr. 50 min.
10-29-84	Review letter to Boring	TRS	10 min.

Date	Description	Atty	Time
11-2-84	Review Biondo's Answers to our Requests for Admission; review latest medical records of Boring; sent same to Boring and Calhoun	TRS	20 min.
11-12-84	Dictated draft of Plaintiffs' Motion for Partial Summary Judgment; began research for Brief in support of same	TRS	3 hr.
11-15-84	Review Jeffes Motion for Summary Judgment; letter to Boring and Calhoun	TRS	1/2 hr.
11-20-84	Research and preparation for Motion and Brief in response to Dft. Jeffes Motion for Summary Judgment	TRS	5 hr.
11-25-84	Proof and revise Motion and Brief re Jeffes Motion	TRS	1 1/2 hr.
11-26-84	Review response to Motion for Summary Judgment, Brief and proposed Order; discussion w/TRS	LJA	1/2 hr.

Date	Description	Atty	Time
11-26-84	Shepardized cases in brief; discussed Motion and Brief w/LJA; finalized same	TRS	1 hr. 10 min.
	Proofing of final documents and filing same	TRS	1 1/4 hr.
11-28-84	Review Brief; discuss w/TRS	LJA	1 hr.
11-28-84	Discussion w/LJA; study of Jeffes' Brief in Support of Motion for Summary Judgment	TRS	1 hr.
11-29-84	Attempted call to client re standing issue	TRS	10 min.
11-30-84	Call from client re standing issue	TRS	10 min.
12-7-84	Review of Dft. Jeffes Motion for Extension of Time	TRS	10 min.
12-19-84	Review of Dft. Jeffes Brief in Opposition to Motion for Summary Judgment; discussion w/LJA	TRS	1 hr.
12-21-84	Dictated draft of Reply Brief	TRS	3 1/2 hr.

Date	Description	Atty	Time
12-27-84	Received Biondo's Brief; briefly reviewed same	TRS	20 min.
1-4-85	Revise draft of Reply Brief	TRS	.4 hr.
1-7-85	Review LJA comments on Brief	TRS	.2 hr.
1-9-85	Review and revise reply to Motions	LJA	1/4 hr.
1-9-85	Revisions in Plaintiffs' Response and Reply Brief; further revisions	TRS	1.7 hr.
1-10-85	Finalized and signed Brief; filed same	TRS	1.2 hr.
1-11-85	Sent out copies of County Dfts. and our Brief to clients	TRS	.2 hr.
4-8-85	Initial review of Magistrate's recommendation; reported out to clients	TRS	.5 hr.
4-9-85	Draft of Objections to Magistrate's Recommendation	TRS	2.5 hr.
4-9-85	Review and revise Memo in Opposition to Magistrate's Report	LJA	1 hr.

Date	Description	Atty	Time
4-11-85	Review and revise Memorandum in Support of Objections to Magistrate's Report	LJA	1/2 hr.
4-29-85	Report out Order granting Dft. Jeffes Summary Judgment Motion; research re appeal	TRS	2.2 hr.
5-14-85	Memo to clients re status conference	TRS	.6 hr.
6-4-85	Determine last correspondence with clients	CD	1.5 hr.
6-4-85	Review blackbooks in preparation for pre-trial conference; conf. with CD	TRS	1.5 hr.
6-5-85	Review letter from Fells; call from Calhoun; memo to file; review pre-trial statement	TRS	.5 hr.
6-5-85	Attend Status Conference	TRS	1.5 hr.
6-5-85	Attend Status Conference	CD	1.5 hr.

Date	Description	Atty	Time
6-6-85	Began to prepare memo to clients re status conference	TRS	.3 hr.
6-10-85	Conference with CD re memo to clients; facts and research	TRS	.5 hr.
6-10-85	Revise Memo to clients; Admissions	CD	1.8 hr.
6-11-85	Revise Memo to clients; Research re Summary Judgment	CD	5 hr.
6-12-85	Research re Summary Judgment	CD	3 hr.
6-17-85	Lexis searches	CD	.5 hr.
6-25-85	Conference with CD re undisputed facts and research for Summary Judgment motion	TRS	.8 hr.
6-25-85	Legal Research	CD	4.5 hr.
6-26-85	Legal Research	CD	5.0 hr.
6-27-85	Legal Research	CD	3.5 hr.
7-3-85	Review letter from Geidel; conference with CD	TRS	.3 hr.
7-5-85	Review CD letter to Geidel	TRS	.3 hr.
7-5-85	Letter re release of medical records	CD	.6 hr.

Date	Description	Atty	Time
7-11-85	Letter and reply re testimony at trial	CD	.25 hr.
7-11-85	Legal Research re Summary Judgment issues	CD	1 hr.
7-12-85	Conference with CD; sent out letter for Geidel medical records	TRS	.2 hr.
7-25-85	Petition for Order Releasing Medical Records of Dale E. Geidel, Sr.	TRS	1 hr.
8-15-85	Background briefing on case	MLD	.3 hr.
8-15-85	Organize facts for agreement between parties	CD	3 hr.
8-23-85	Review material created by CD; review Motions from Defendants	TRS	1.2 hr.
8-26-85	Conference with MLD and consideration re response to Defendants Motion for Partial Summary Judgment Motion	TRS	1 hr.
8-26-85	Research re Class Action Local Rules	MLD	2 hr.

Date	Description	Atty	Time
8-27-85	Check with Clerk re transcript of status conference (5-5-82)	MLD	.05 hr.
8-29-85	Brief in Response to Defendants' Motions; Plaintiffs' Motion for Extension of Time; letter to clients	TRS	2 hr.
9-3-85	Review Motions, etc.	TRS	.7 hr.
9-9-85	Review LJA comments to Brief; proof same	TRS	1 hr.
9-9-85	File Motions and Brief	MLD	3/4 hr.
9-26-85	Review and revise reply memo	LJA	1/2 hr.
9-28-85	Draft Reply Brief	TRS	1.1 hr.
10-10-85	Draft Summary Judgment Motion	CD	3/4 hr.
10-11-85	Telephone conference with Judge Mencer's clerk re filing response to Summary Judgment Motion	LJA	1/4 hr.
10-11-85	Deliver missing Briefs to Judge	MLD	3/4 hr.
10-14-85	Brief in support of Partial Summary Judgment Motion	CD	.5 hr.

Date	Description	Atty	Time
10-15-85	Drafted Order, Cert. of Service, Brief in Support of Partial Summary Judgment Motion	CD	2.5 hr.
10-21-85	Assembled documents to be sent to Defendants regarding Order to Release Medical Records	CD	.5 hr.
10-22-85	Filed Petition for Order Releasing Medical Records	CD	.4 hr.
10-24-85	Drafted Partial Summary Judgment Brief; related research	CD	5 hr.
10-29-85	Summary Judgment Brief; related research	CD	2.5 hr.
10-29-85	Review letter from Prentis Johnson; response thereto	TRS	.3 hr.
10-30-85	Review of correspondence	TRS	.6 hr.
10-31-85	Review of Memo and Order from Judge Mencer; began memo to clients	TRS	1 hr.
11-1-85	Research re Damages in Civil Rights cases	TRS	1 hr.

Date	Description	Atty	Time
11-4-85	Conference w/LJA; memo to clients; review of case history	TRS	2.5 hr.
11-4-85	Review Court Orders; discuss w/TRS	LJA	1/2 hr.
11-5-85	Review memo to clients re recent decisions	LJA	1/4 hr.
11-5-85	Letter to Huntingdon to release and send copies of medical records	CD	.2 hr.
11-12-85	Review Complaint, admissions, etc.; conference w/LJA; memo to clients; preparation of various documents re appeal	TRS	4 hr.
11-13-85	Discuss status w/TRS	LJA	1/4 hr.
11-13-85	Review of appeal documents	TRS	.4 hr.
11-14-85	Conference w/LJA; revisions in memo	TRS	1 hr.
11-14-85	Review and revise Notice of Appeal and Motion to Stay; discuss w/TRS	LJA	3/4 hr.

Date	Description	Atty	Time
11-14-85	Review and revise memo to clients re appeal	LJA	1/4 hr.
8511-16-85	Meeting w/Calhoun at Western Penn	LJA	2 1/2 hr.
11-19-85	Review Boring's response; call to J. Mencer's chambers	TRS	.5 hr.
11-20-85	Legal Research; discussion w/LJA	TRS	2 hr.
11-20-85	Discussion w/TRS	LJA	1/4 hr.
11-21-85	Legal Research	CD	3.7 hr.
11-22-85	Legal Research	CD	.75 hr.
11-25-85	Draft memo to Plaintiffs re appeal	LJA	1/2 hr.
11-27-85	Conference w/LJA; finalized Notice of Appeal; filed same; memo to clients	TRS	.7 hr.
11-27-85	Filed Notice of Appeal with Court and got copies made	MLD	1 hr.
11-27-85	Discuss appeal w/TRS; revise memo to clients	LJA	1/4 hr.
11-27-85	Call from Geidel; withdrew Appeal; memo to clients	TRS	.6 hr.

Date	Description	Atty	Time
12-2-85	Review letter from Fells; letter to Fells; proof memo to clients	TRS	.6 hr.
12-5-85	Review letter from and letter to Fells	TRS	.5 hr.
	Review of file; collection of additional cases	TRS	.9 hr.
12-17-85	Revise letter from Fells, letter to Fells; review blackbooks	TRS	1 hr.
2-12-86	Review letter from Foster/Johnson atty. to J. Mencer; draft of letters to atty., J. Mencer and clients	TRS	1.5 hr.
2-13-86	Review and revise letters to Bebenek, J. Mencer and clients	LJA	1/2 hr.
3-5-86	Prepared Stipulation re dismissal of claims against Dr. Foster	TRS	.6 hr.
3-13-86	Call to Bebenek re dismissal of claims against Dr. Foster	TRS	.3 hr.
4-4-86	Call from Lisa Pupo re Lena Huang re review of complaint and evaluation of claims	TRS	.3 hr.

Date	Description	Atty	Time
4-16-86	Memo to clients; letter to Lisa Pupo	TRS	.4 hr.
4-23-86	Call from Geidel; letter to Geidel; letter to Pupo	TRS	1 hr.
6-2-86	Draft of letter to Bebenek re claims against Dr. Johnson	TRS	.6 hr.
7-24-86	Draft Brief in Response to Dfts. Motion for Summary Judgment	BF	3 hr.
7-25-86	Draft Brief in Response to Dfts. Motion for Summary Judgment	BF	5 hr.
7-28-86	Review of Johnson Motion; review of BF Brief in response	TRS	1 hr.
8-1-86	Review LJA comments to Brief	TRS	.3 hr.
8-1-86	Review Summary Judgment Motion, supporting Brief; draft Plaintiffs Brief; memo to clients	LJA	3/4 hr.

Date	Description	Atty	Time
8-18-86	Brief in Opposition to Defendant Huang's Motion for Summary Judgment	TRS	1 hr.
8-21-86	File Brief with Court	MLD	1/2 hr.
10-2-86	Telephone conference w/Judge's clerk; draft writs ad testicandum	LJA	3/4 hr.
10-6-86	File writs w/Clerk to testify	MLD	1 1/4 hr.
10-7-86	Telephone conference w/Boring; discuss case w/TRS	LJA	1/2 hr.
10-9-86	Telephone conference w/R. Barth and Marshall's office re correction of Writ	LJA	1/4 hr.
10-10-86	Review file, pretrial narrative, letters to Boring and Calhoun	LJA	1 1/2 hr.
10-13-86	Telephone conference w/Boring re trial preparation; review status w/MLD	LJA	3/4 hr.
10-13-86	Review materials; get familiar with case	MLD	2 1/2 hr.
10-14-86	Meeting w/Boring review testimony	MLD	2 1/2 hr.

Date	Description	Atty	Time
10-14-86	Prepare memo re meeting w/Boring	MLD	1¼ hr.
10-14-86	Assemble exhibits	MLD	3¼ hr.
10-14-86	File Praecipe of Appearance and Writ of Habeas Corpus Ad Test	MLD	½ hr.
10-14-86	Telephone conference w/R. Barth and U.S. Marshall re trial	LJA	½ hr.
10-15-86	Review Kozakiewicz deposition transcript; prepare opening statement	LJA	3½ hr.
10-15-86	Conference w/MLD re witnesses; telephone call w/LJA; prepare Voir Dire questions; calls from Biondo and J. Mencer's clerk	TRS	3.2 hr.
10-15-86	Review exhibits and witnesses; file Voir Dire questions; research jury instructions	MLD	5½ hr.
10-16-86	Review of exhibits w/MLD	TRS	2.3 hr.
10-16-86	Pretrial preparation, exhibits review cases	MLD	4½ hr.

Date	Description	Atty	Time
10-16-86	Meeting w/TRS re trial preparation	LJA	1¼ hr.
10-17-86	Trial preparation	LJA	1½ hr.
10-17-86	Prepare exhibits; plan testimony; prepare jury instructions	MLD	6 hr.
10-17-86	Assembled exhibit books	CD	4 hr.
10-18-86	Prepare jury instructions	MLD	4 hr.
10-18-86	Prepare jury instructions; review testimony plan	MLD	7½ hr.
10-18-86	Trial preparation	LJA	2 hr.
10-18-86	Review proposed jury instructions; draft proposed interrogatories to jury	TRS	.4 hr.
10-19-86	Prepare for direct examination of Fells and Johnson	TRS	3.5 hr.
10-20-86	Attend trial	LJA	8 hr.
10-20-86	Attend trial; Boring direct; interviewed Beatty; prepared for direct examination of Beatty	TRS	8.5 hr.

Date	Description	Atty	Time
10-20-86	Prepare for trial/ review jury instructions	MLD	1 hr.
10-20-86	Attend trial	MLD	6 hr.
10-20-86	Prepare for examination of Ronald Perry	MLD	1½ hr.
10-21-86	Interview Perry before trial	MLD	¾ hr.
10-21-86	Attend trial	MLD	6 hr.
10-21-86	Prepare for examination of Longmore	MLD	1 hr.
10-21-86	Attend trial; meeting at Western Pen w/Fells; prepare for direct examination	TRS	10 hr.
10-21-86	Prepare for and Attend trial; meeting at Western Pen w/Boring, Calhoun and Geidel; Fells and TRS	LJA	12 hr.
10-22-86	Prepare for and attend trial; post-trial meeting among counsel	LJA	8 hr.
10-22-86	Attend trial	TRS	7.5 hr.
10-22-86	Prepare for trial	MLD	1 hr.
10-22-86	Attend trial	MLD	6 hr.

Date	Description	Atty	Time
10-22-86	Research re Johnson lack of Answer and Pretrial Narrative; preparation of Affidavit and Notice of Entry of Default	MLD	2¼ hr.
10-23-86	Pretrial preparation; attend trial; argue motions for directed verdict	LJA	12 hr.
10-23-86	Attend trial and preparation	MLD	8½ hr.
10-23-86	Attend trial; assist LJA re motions for directed verdict	TRS	10 hr.
10-24-86	Attend trial	LJA	7 hr.
10-24-86	Attend trial	TRS	7 hr.
10-24-86	Trial preparation/jury instructions	MLD	9 hr.
10-25-86	Prepare closing argument re Perry; research re instructions	MLD	1¼ hr.
10-26-86	Review and revise proposed jury instructions and interrogatories to jury; meeting w/TRS and MLD to discuss pertinent case law	LJA	3 hr.

Date	Description	Atty	Time
10-26-86	Meeting w/LJA and MLD to review interrogatories and instructions to jury; research re segregation w/o prior hearing, amount of damages for cruel and unusual punishment in absence of precise measurable damages	TRS	5 hr.
10-26-86	Meeting w/LJA and TRS re jury instructions and interrogatories; research	MLD	4¾ hr.
10-27-86	Prepare jury instructions and interrogatories for Court	MLD	1 hr.
10-27-86	Draft jury instructions	LJA	1 hr.
10-27-86	Prepare for and attend charge conference	TRS	6 hr.
10-27-86	Deliver instructions and interrogatories to Court and Defendants	MLD	1 hr.
10-27-86	Research re Defendants' instructions to jury	MLD	2½ hr.

Date	Description	Atty	Time
10-27-86	Attend charge conference	MLD	4¾ hr.
10-27-86	Charge conference w/Court; prepare closing argument	LJA	5¾ hr.
10-28-86	Prepare closing argument; attend Court for closing arguments and jury charge; attend Court for answers to jury questions and rending of verdict	LJA	6 hr.
10-28-86	Attend trial; verdict	MLD	6 hr.
10-28-86	Attend trial; closings and charge; attend jury verdict	TRS	6 hr.
10-29-86	Telephone conference w/Boring re verdict; letter to Beatty re verdict	LJA	.3 hr.
10-29-86	Research re attorneys' fees	MLD	2½ hr.
10-30-86	Research re attorneys' fees in civil rights cases	MLD	2 hr.

Date	Description	Atty	Time
10-30-86	Telephone conference w/reporter Davis of Pittsburgh Press re verdict	LJA	1/4 hr.
10-30-86	Unpacked bags, etc.	TRS	1 hr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY ALAN BORING, et al.,
Plaintiffs,
v.
CHARLES J. KOZAKIEWICZ, et al.,
Defendants.

Civil Action No. 81-1446

ANSWER TO PLAINTIFFS' MOTION REQUESTING COSTS AND ATTORNEYS' FEES

AND NOW, come the defendants, Charles Kozakiewicz, Gary Knotts, and Edward DeSabato, by and through their attorneys, Wayman, Irvin & McAuley, and requests this Honorable Court to deny the plaintiffs' Motion for Attorneys' Fees and Costs for the following reasons:

1. The Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, authorizes the court, in its discretion, to allow reasonable attorneys' fees as part of the prevailing parties' cost.

2. The plaintiffs' should not be awarded any attorneys' fees in the above-captioned case for the following reasons:

(a) These plaintiffs have failed to file a timely Motion for Attorneys' Fees and Costs pursuant to Local Rule 33, as set forth for the U.S. District Court for the Western District of Pennsylvania. The rule so states:

Any motion for the attorneys' fees which is not to be filed prior to the entry of final judgment shall be filed within ten days of entry of the final judgment by

the District Court, whether or not an Appeal has been or is subsequently filed.

(b) The plaintiffs are not the prevailing party as required under 42 U.S.C. §1988;

(c) The defendants have consistently acted in good faith and without wrongful intent or culpable negligence at all times prior to the filing of this action, and during the litigation of this action before the District Court.

(d) An award of attorneys' fees to the plaintiffs would be unjust under the circumstances of the case.

3. The amount of legal fees as requested is grossly excessive in that:

(a) the hourly rate requested is excessive in light of the circumstances of this case, and employment and experience of the attorneys for plaintiffs;

(b) the schedule of hours as prepared by the attorneys for the plaintiffs is excessive, and the schedule of hours submitted in support of the Motion for Award of Attorneys' Fees does not accurately reflect a fair and reasonable estimate of the actual time spent by plaintiffs' attorneys;

(c) the number of hours charged for trial time in the schedule of hours shows the presence of three attorneys from the same lawfirm, and a charge is made for the hours spent at trial by all three, wherein counsel representing other parties to this action had one counsel representing their clients at the time of trial;

(d) the schedule of hours as compiled by plaintiffs' attorneys includes such excessive items as "unpacking bags" and telephone discussions with a member of the media; and

(e) plaintiffs' counsel have improperly added a fifty-percent multiplier figure to the total amount calculated for billable hours.

WHEREFORE, these defendants respectfully request that this Honorable Court deny the plaintiffs' Motion for Award of Attorneys' Fees or, in the alternative, request that this Court allow a hearing to determine whether or not such claimed attorneys' fees are fair and reasonable and/or, in the alternative, allow these defendants to present their counsel fees for consideration as an offset of any counsel fees as the plaintiffs were not the prevailing party in the matter.

Respectfully submitted,
WAYMAN, IRVIN & MCAULEY

By: CATHIE J. FAGAN
Cathie J. Fagan,
Attorney for Defendants,
Kozakiewicz, Knotts, and
DeSabato.

CERTIFICATE OF SERVICE

WE DO HEREBY certify that a true and correct copy of the within Answer to Plaintiffs' Motion Requesting Costs and Attorneys' Fees has been served upon all counsel of record by U.S. Mail, postage prepaid, this day of January, 1987.

By: CATHIE J. FAGAN
Cathie J. Fagan, Atty.

No. 88-441

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1988

CHARLES J. KOZAKIEWICZ, GARY KNOTTS
and EDWARD DeSABATO,

Petitioners,

vs.

TERRY A. BORING, ANDRE CALHOUN, WELDON
FELLS, DALE E. GEIDEL, RONALD PERRY,
and DAVID BEATTY

Respondents.

**RESPONSE TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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TABLE OF CONTENTS

Statement of Facts.....1

Argument.....5

I 6

II 8

III 11

Conclusion.....13

TABLE OF CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 249 (1975).....9

Hensley v. Eckerhart, 461 U.S. 424 (1938).....6

Inmates of Allegheny County v. Pierce 457 F.Supp. 984 (W.D. Pa., 1978), aff'd. in part and rev'd in part 612 F.2d 754 (3rd Cir. 1979).....1, 7

Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012 (1985).....9

United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1968).....9

TABLE OF STATUTES

Rules of the Supreme Court, Rule 17.....5

42 U.S.C. §1988.....2, 4, 8, 9, 10, 11

STATEMENT OF THE FACTS

This is the second time that the Court has received a petition for certiorari in this prisoner's civil rights case. On February 8, 1988, the prisoner plaintiffs petitioned for a writ of certiorari to the Court of Appeals for the Third Circuit to review a split decision of that Court concerning the substantive due process rights of pretrial detainees. That petition was denied on April 11, 1988.

The present petition asks this Court to review a unaminous, two paragraph affirmance of an award of costs by the District Court. Such an award was reasonable and within the discretion of the District Court.

This is one of many prisoner civil rights cases which have been filed pro se in the District Courts. The District Court for the Western District of Pennsylvania has been flooded with such pro se complaints after its decision in Inmates of Allegheny County v. Pierce, 457 F.Supp. 984 (W.D. Pa., 1978), aff'd. in part and rev'd in part 612 F.2d 754 (3rd Cir. 1979). In that case the Court ruled that the condition of the Allegheny County Jail in Pittsburgh, Pennsylvania in 1975-76 violated the Constitutional rights of the inmates. Most of the pro se complaints were poorly drafted and often the procedural rules of the Court had not been followed. Some of the complaints were filed by several plaintiffs. In multiple plaintiff complaints, the inmates often refused to designate a single spokesman for the

group. Each prisoner wanted to attend every conference and other proceedings concerning his case.

The District Court wanted to assure that every complaint was carefully considered and that no complaint was summarily dismissed. Yet, the pro se complaints were often difficult to understand and the Court was reluctant to speak to the plaintiff in order to learn the inmate's precise complaint. Furthermore, the Court did not want to bring every inmate in a multiple party complaint to every court proceeding unless it was absolutely essential to do so.

On April 28, 1981, the District Court sent a plea to area law firms for counsel to accept the more complicated and possibly meritorious cases on a pro bono basis. One of those requests was directed to the eight lawyer patent law firm of Buell, Blenko, Ziesenheim & Beck. Lynn J. Alstadt of that firm answered the call and volunteered for an appointment.

Before any appointments were made, the Court sponsored a one day seminar about prisoner civil rights cases. Mr. Alstadt attended the program and was told that an incentive for participating in the program is the provision for an award of counsel fees to successful plaintiffs pursuant to 42 U.S.C. §1988.

On January 14, 1982, Mr. Alstadt was appointed as counsel to the plaintiffs. Two weeks later he began his review of the Court files for the case and met with two of the plaintiffs. To his surprise, Mr. Alstadt discovered that 41

documents regarding this case, which took over five hours to review, had been filed before his appointment.

Immediately after his appointment, Mr. Alstadt undertook to prepare a Third Amended Complaint at the request of the magistrate and with the agreement of defense counsel, setting forth precisely the issues and parties involved in the case. That complaint listed 9 plaintiffs and 44 defendants and 21 causes of action. The drafting of this complaint necessarily involved a review of the Court's file on this case, legal research, and numerous meetings and discussions with the individual plaintiffs. Several drafts of this complaint were made in an attempt to precisely state the claims made in the two previously filed complaints and numerous affidavits as well as the information received from the clients.

Plaintiffs were indigent and unable to pay the out-of-pocket non-taxable expenses such as postage, photocopying and travel associated with meeting with the plaintiffs at the Western Penitentiary in Pittsburgh where some of the plaintiffs were then housed. Although the plaintiffs requested assistance from the Court for out-of-pocket expenses, the Court was unable to provide any assistance to the plaintiffs.

Despite these obstacles, six of the plaintiffs were able to prevail against defendants, Warden Charles Kozakiewicz, Deputy Warden Gary Knotts and Jail Administrator Edward DeSabato who had principal responsibility for the conditions and events at the

Allegheny County Jail which prompted the complaint.[1] Because of the difficulty in assessing actual money damages for the deprivation of constitutional rights for the imprisoned plaintiffs, the jury awarded each of the prevailing plaintiffs nominal damages. The amount of the award is in no way a measure of the complexity of the case or the value of the services rendered by plaintiffs' attorneys.

Subsequent to the trial, plaintiffs filed a Motion Requesting Costs. This Motion, which, pursuant to 42 U.S.C. §1988, included attorney's fees, included a complete and detailed summary of the taxable costs incurred by plaintiffs during the course of the litigation and the time expended by plaintiffs' counsel in this matter. Plaintiffs sought $89,312.43 in costs.

After a series of response briefs and reply briefs by both plaintiffs and defendants, including Plaintiffs' Motion for Extension of Time to Request Attorneys Fees, the Honorable Glenn E. Mencer issued an Order and Memorandum opinion awarding plaintiffs $41,764.47 in costs. In justifying this award, Judge Mencer commented that counsel "vigorously and skillfully fought for the plaintiffs' interests". Judge Mencer fully considered and commented on every argument raised by defendants in their briefs to the Court regarding the award of costs.

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1. Two of the plaintiffs, Philip Meighan and Prentiss Johnson, did not prevail against the defendants. Counsel for plaintiffs were unable to locate Philip Meighan once he had completed serving his prison sentence. Prentiss Johnson attended the first day of the trial but became ill and asked to be excused. Consequently, he failed to testify at the trial regarding the conditions as the Jail through which he suffered.

On February 8, 1988, the prisoner plaintiffs petitioned for a writ of certiorari brought by plaintiffs to the Court of Appeals for the Third Circuit was docketed and given the designation No. 87-6529. This petition, which concerned an Opinion of the Court of Appeals for the Third Circuit regarding the substantive aspects of plaintiffs' case, was ultimately denied on April 4, 1988.

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States makes clear that a review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Plaintiffs respectfully submit that there are no special and important reasons for granting defendants' petition.

In granting plaintiffs' request for costs, the Honorable Glenn E. Mencer properly exercise his discretion. Judge Mencer determined that plaintiffs' success was limited. He also determined that plaintiffs' counsel vigorously and skillfully fought for the plaintiffs' interests. Judge Mencer reviewed the itemized list of costs and decided against the application of a multiplier. Judge Mencer examined the particular entries listed in Schedule D to Plaintiffs' Motion Requesting Costs and withdrew those which he thought were excessive. In all, Judge Mencer awarded plaintiffs costs in an amount which, in his discretion, was consistent with the degree of plaintiffs' success at trial.

Defendants have raised several objections to the discretionary decisions of Judge Mencer. However, each of these objections criticizes a factual determination or exercise of discretion made by Judge Mencer. Defendants' objections do not provide special and important reasons for granting a writ of certiorari.

- I -

The first issue raised by defendants is whether an award of One Dollar by the plaintiffs against some, but not all, of the defendants entitles the plaintiffs as a "prevailing party" to recovery of all attorney fees as costs. Judge Mencer, and the Third Circuit agreed with defendants that the answer is no. Plaintiffs are not entitled to all of their attorney fees as costs and were not awarded all of their attorney fees as costs. Instead, an award of attorney fees as costs which was consistent with plaintiffs' degree of success was ordered by Judge Mencer at his discretion.

Defendants' attempts to raise this issue begs the question upon which defendants' appeal, as well as their petition for a writ of certiorari, is based. That question is whether the award of attorney's fees as costs reflects the degree of success achieved by plaintiffs. The answer to this question is yes.

This Court has set a rule to be followed in determining whether a fee reduction is proper. In Hensley v. Eckerhart, 461 U.S. 424, 436 (1938) for the following rule:

> "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claim, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Inmates of Allegheny County, supra at 180."

In the present case, the plaintiffs objected to the general totality of conditions existing at the Allegheny County Jail during their incarceration. In addition, the plaintiffs objected to various specific conditions which constituted that totality. The interrelatedness of the specific conditions of confinement to the general totality of conditions is obvious. Plaintiffs' objections regarding medical treatment, contact visitations, religious services, meals, access to the law library, access to telephones and the composition of the disciplinary boards, as well as their other objections all constitute the general totality of conditions existing at the Allegheny County Jail. All of these factors were under the direct control of the defendants against whom the jury made its award.

The jury decided that the general totality of conditions that existed at the Allegheny County Jail violated the constitutional rights of the plaintiffs who were incarcerated

therein.[2] The claims which were not individually brought before the jury were nevertheless so intertwined with and overlapped the issues on which the plaintiffs prevailed that no fee reduction should be made in this case.

Judge Mencer presided over the trial and experienced first hand the amount of success achieved by plaintiffs. Based on his familiarity with the action and personal knowledge of the pertinent facts, Judge Mencer acted properly within his discretion in awarding attorney fees as costs to plaintiffs. This exercise of discretion by Judge Mencer does not provide special and important reasons for granting a writ of certiorari.

- II -

The second issue raised by defendants is whether a local rule of court regarding attorney fees preempts a motion for costs pursuant to 42 U.S.C. §1988. The answer to this question is no.

Plaintiff's request for costs, including attorneys' fees, was timely filed. Rule 54(d) of the Federal Rules of Civil Procedure provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs..." Unless so defined by statute, attorneys' fees are not generally considered "costs"

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2. At the insistance of counsel for defendants, plaintiffs' proposed special interrogatories to the jury were not used. Instead, the jury had before it only a general verdict slip.

taxable under Rule 54(d). Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 249 (1975)

Section 1988 of Title 42 of the United States Code states in relevant part as follows:

> ". . . In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], . . . the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This statute by its plain language establishes that attorney fees are to be considered as costs. This statute, by its requirement of judicial discretion, also provides an exception to the general rule that costs are allowed as of right.

Plaintiffs brought their motion requesting costs 43 days after final judgement in this case. Since the Western District of Pennsylvania has no local rule which sets a time limit on the application of requests for costs, the only requirement that such an application must meet is that the request for costs must not be so untimely as to cause unfair prejudice to the defendant. United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1968). As determined by Judge Mencer, plaintiffs' request does not create unfair surprise or prejudice.

In Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012 (1985), this Court followed a "plain meaning" analysis in interpreting 42 U.S.C. §1988 as it relates to Rule 68 of the Federal Rules of Civil Procedure. In Marek, the plaintiff brought a civil rights action against the defendant. Before trial, the defendant made an offer of judgment pursuant to Rule 68. The plaintiff refused

the offer, and subsequently was awarded a judgment that was less than that which the defendant offered. The plaintiff then submitted a request for costs which included both pre-offer and post-offer attorney fees.

This Court held that because the plain meaning of Section 1988 provides that a prevailing party may be awarded attorney fees as part of the costs, an award of attorney fees to the prevailing party in a civil rights action is subject to the cost-shifting provision of Rule 68. Using this plain meaning analysis, this Court reasoned that the plaintiff was not entitled to an award of post-offer attorney fees.

Plaintiffs respectfully submit that, under the plain meaning of 42 U.S.C. §1988 as set forth by this Court, a prevailing party in a civil rights action may recover his costs, including attorney fees, by filing a motion requesting costs. This is precisely what plaintiffs have done in this case. Because the provision of Local Rule 33 do not apply to motions requesting costs, Local Rule 33 cannot bar plaintiffs' present Motion Requesting Costs.

The purpose behind local rules setting deadlines for motions for costs and motions for attorney fees is to prevent undue surprise or prejudice from adversely affecting the party against whom the motions were raised. In the absence of such prejudice or surprise, the Court, in its discretion, can decide this amount, if any, of costs or attorney fees to be awarded.

Judge Mencer in his Memorandum Opinion expressly found that defendants were not subjected to any unfair surprise or

prejudice. (Appendix, p. 7a). Because of this lack of surprise and prejudice, Judge Mencer used his discretionary powers and entered an order awarding costs to plaintiffs. Such a use of discretionary power does not provide special and important reasons for granting a petition for a writ of certiorari.

In this regard, it is important to note that plaintiffs' Motion for an Extension of Time to File a Request for Attorney Fees is still pending before Judge Mencer. In light of Judge Mencer's finding in the Memorandum Opinion that defendants were not subject to any unfair surprise or prejudice, it is extremely likely that Judge Mencer would grant this motion if the Judgment Order of the Third Circuit was eventually reversed by this Court. Such an action by Judge Mencer would be within his discretionary power and consistent with the action he has taken regarding plaintiffs' request for costs.

- III -

The final issue raised by defendants is whether an evidentiary hearing is required regarding the appropriateness of certain fees claimed under 42 U.S.C. §1988. The answer to this question is no.

Section 1988 provides that the District Court, in its discretion, may allow the prevailing party, a reasonable attorney's fee as part of the costs." This is precisely what the District Court did. The Court fully considered the arguments set

forth in defendants' memoranda and in plaintiff's memoranda. After a reasoned deliberation on the arguments, the Court concluded that plaintiffs, as prevailing party, were entitled to costs.

The Memorandum Opinion prepared by Judge Mencer reveals that Judge Mencer examined plaintiffs' Costs Schedules. Judge Mencer considered the degree of success achieved by plaintiffs in determining the amount of the award. Judge Mencer reviewed the individual entries and withdrew those for services which did not merit compensation. Judge Mencer also limited the award to the services reasonably necessary to the case.

In his Memorandum Opinion, Judge Mencer commented on the vigorous and skillful fight waged by plaintiffs' counsel. By his own familiarity with the case, he considered the novelty and complexity of the questions presented. He understood the time limitations imposed by circumstances and the undesirability of accepting a case under an appointment. In all, Judge Mencer fully considered the factors listed in defendants' petition.

Judge Mencer properly exercised his discretion in decreasing plaintiffs' denial by over $47,500.00 in ordering an award of costs. Judge Mencer's determination of attorney fees reflects the proper use of his discretionary authority. Such use of discretionary power does not provide special and important reasons for granting a petition for a writ of certiorari.

CONCLUSION

Defendants Petition for Writ of Certiorari should be denied.

Dated September 29, 1988

Respectfully submitted,

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